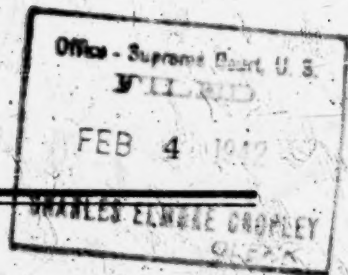


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IN THE
Supreme Court of the United States
OCTOBER TERM, 1941.

No. ~~020~~ 23

IN THE MATTER OF

CHANCEY RAY BROWN AND MARY G. BROWN,

DEBTORS.

STATE BANK OF HARDINSBURG,

Petitioner,

vs.

CHANCEY RAY BROWN AND MARY G. BROWN,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF APPEALS FOR THE SEVENTH
CIRCUIT AND BRIEF IN SUPPORT THEREOF.**

TELFORD B. ORBISON,

New Albany, Indiana,

Counsel for Petitioner.

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STATE BANK OF HARDINSBURG,

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CHANCEY RAY BROWN AND MARY G. BROWN,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF APPEALS FOR THE
SEVENTH CIRCUIT.**

To the Honorable, the Chief Justice and the Associate
Justices of the Supreme Court of the United States:

Your petitioner, State Bank of Hardinsburg, a banking corporation organized under the laws of the State of Indiana, prays this Court for the issuance of a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review a final judgment of that Court reversing a decree of the United States District Court for the Southern District of Indiana, New Albany Division, and in support thereof respectfully shows:

A.

Summary Statement of Matter Involved,

On May 28, 1940, respondents, as farmer-debtors, filed in the District Court their petition for relief under Section 75 of the Bankruptcy Act of 1898, as amended. (R. 1 and 8.) The schedules which accompanied the petition listed, among other assets, 125 acres of farmland in Orange County, Indiana (R. 17), upon which the petitioner originally had held a \$2,500.00 mortgage under date of February 19, 1938. (R. 55.)

Prior to the time respondents filed their petition and schedules the petitioner filed a complaint on March 4, 1939, in the Orange Circuit Court of Indiana to foreclose its mortgage, obtained a judgment of foreclosure on November 20, 1939, and purchased the property at the sheriff's sale on May 25, 1940. The sheriff's deed, however, was not delivered to petitioner as purchaser until June 1, 1940, which was three days after the petition and schedules were filed. (R. 56 and 57.)

On August 3, 1940, petitioner filed its motion to strike the property from the schedules, on the ground that under the Indiana statutes pertaining to mortgage foreclosures the period of redemption expired with the sheriff's sale.

¹ Section 3-1801, Burns Indiana Statutes, Annotated, 1933, provides that in any proceeding for the foreclosure of any mortgage, no process shall issue for the execution of any judgment or decree of sale for a period of one year after filing of a complaint in any such proceeding. Section 3-1803 provides that the owner of the real estate may redeem the same at any time prior to the sale by the sheriff. Section 3-1806 provides that immediately after such sale the sheriff shall execute and deliver to the purchaser a deed of conveyance for the premises. Section 3-1808 provides that there shall be no redemption from foreclosures of mortgages except as above provided.

and that as a consequence the respondents had no right or interest in such property at the time they filed their petition on May 28, 1940, for relief under Section 75. (R. 37-55.)

The District Court sustained petitioner's motion to strike, made special findings of fact and conclusions of law, and on November 20, 1940, entered judgment accordingly. (R. 55-61.) The Circuit Court of Appeals for the Seventh Circuit, by a divided court, reversed on November 8, 1941, holding that although under the Indiana law the right of redemption was cut off by the sheriff's sale,² nevertheless the bankruptcy court did acquire jurisdiction under sub-

² The mortgage involved is controlled by Sections 3-1801 to 3-1809, Burns Indiana Statutes, Annotated, 1933, (Appendix, pp. 23-27), in view of the fact it was executed subsequent to 1931, when these Sections became effective. Consequently, Section 2-3909, Burns Indiana Statutes, Annotated, 1933, which was applicable to mortgages executed prior to 1931, and which was construed in *Hubble v. Berry*, 180 Ind. 513, 103 N. E. 328, 330, is not involved in this case. The only difference, however, between the old law and the new law is that under the former the sheriff, upon a sale under a decree of mortgage foreclosure, is authorized to issue to the purchaser a certificate of purchase which "shall entitle the purchaser . . . or assigns, to a conveyance of the estate and said real property bought by said purchaser at the expiration of one (1) year from the date of his purchase unless the same shall have been previously redeemed as hereinafter provided," whereas under the latter, under Sections 3-1801 and 3-1803, the sheriff's sale cannot be held until at least one year after the complaint is filed and the mortgagor may redeem at any time prior to the sheriff's sale. In other words, under the former the period of redemption expires one year from the sheriff's sale, whereas under the latter it expires with the sheriff's sale. The principles of law, however, laid down in *Hubble v. Berry*, are applicable to the instant case, as are those laid down in *Wright v. Union Central Life Ins. Co.*, 304 U. S. 502, 82 L. ed. 1490, 58 S. Ct. 1025, which not only discusses the effect of the Indiana law relating to the right of redemption, but also quotes with approval the opinion of *Hubble v. Berry*.

section (n) of Section 75³ because the sheriff's deed had not been delivered at the time of the filing of the petition. The majority opinion written by Judge Minton is printed (R. 86) but not reported.

Judge Major wrote the dissenting opinion (R. 90), holding that inasmuch as the right of redemption had been cut off by the sheriff's sale the bankruptcy court could not acquire jurisdiction over the property under subsection (n) of Section 75, because respondents had no right or equity in the property at the time their petition was filed, and that to hold otherwise would render the subsection unconstitutional. Both opinions are set forth in the Appendix at pages 30-37.

³ Section 75 (n) of the Bankruptcy Act of 1898, as amended, reads as follows:

"The filing of a petition or answer with the clerk of court, or leaving it with the conciliation commissioner for the purpose of forwarding same to the clerk of court, praying for relief under section 75 of this Act, as amended (this section), shall immediately subject the farmer and all his property, wherever located, for all the purposes of this section, to the exclusive jurisdiction of the court, including all real or personal property, or any equity or right in any such property, including, among others, contracts for purchase, contracts for deed, or conditional sales contracts, the right or the equity of redemption where the period of redemption has not or had not expired, or where a deed of trust has been given as security, or where the sale has not or had not been confirmed, or where deed had not been delivered, at the time of filing the petition.

"In all cases where, at the time of filing the petition, the period of redemption has not or had not expired, or where the right under a deed of trust has not or had not become absolute, or where the sale has not or had not been confirmed, or where deed had not been delivered, the period of redemption shall be extended or the confirmation of sale withheld for the period necessary for the purpose of carrying out the provisions of this section. (49 Stat. 942, c. 792; 11 U. S. C. A. Sec. 203.)"

B.

Jurisdictional Statement.

(a) The statutory provisions which sustain the jurisdiction of the Supreme Court are as follows:

1. Section 75 (n) of the Bankruptcy Act provides that in proceedings under the Section, except as otherwise provided, "the jurisdiction and powers of the courts, the title, powers, and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered." (49 Stat. 942, chap. 792; 11 U. S. C. A., Sec. 203.)

2. Section 24 (c) of the Bankruptcy Act vests this Court "with jurisdiction to review judgments, decrees and orders of the Circuit Court of Appeals of the United States" in proceedings under the Act in accordance "with the provisions of the laws of the United States now in force or such as hereafter be enacted." (Act of 1898, as amended by Act of May 27, 1926, and Act of June 22, 1938, c. 575, Sec. 1, 52 Stat. 854; 11 U. S. C. A., Sec. 47.)

The provisions of Section 24 are applicable to proceedings under Section 75. *Raentsch v. American Co.*, (9th C. C. A.) 82 Fed. (2d) 770.

3. Section 240 of the Judicial Code, as amended, provides for certiorari from this Court to any Circuit Court of Appeals in any case, civil or criminal. (Act of June 7, 1934, c. 426, 48 Stat. 926; 28 U. S. C. A., Sec. 347.)

(b) Section 75 (n), the validity of which is challenged by petitioner, if it be construed as contended by the Court of Appeals for the Seventh Circuit, reads as follows:

"The filing of a petition or answer with the clerk of court, or leaving it with the conciliation commissioner

for the purpose of forwarding same to the clerk of court, praying for relief under section 75 of this Act, as amended (this section), shall immediately subject the farmer and all his property, wherever located, for all the purposes of this section, to the exclusive jurisdiction of the court, including all real or personal property, or any equity or right in any such property, including, among others, contracts for purchase, contracts for deed, or conditional sales contracts, the right or the equity of redemption where the period of redemption has not or had not expired, or where a deed of trust has been given as security, or where the sale has not or had not been confirmed, or where deed had not been delivered, at the time of filing the petition.

"In all cases where, at the time of filing the petition, the period of redemption has not or had not expired, or where the right under a deed of trust has not or had not become absolute, or where the sale has not or had not been confirmed, or where deed had not been delivered, the period of redemption shall be extended or the confirmation of sale withheld for the period necessary for the purpose of carrying out the provisions of this section."

(49 Stat. 942, c. 792; 11 U. S. C. A., Sec. 203.)

(c) The United States Circuit Court of Appeals for the Seventh Circuit, with the court divided, handed down its written opinion and rendered judgment on November 8, 1941. (R. 86-93.)

C.

The Questions Presented.

(a) Do the provisions of Section 75 (n) of the Bankruptcy Act give a court of bankruptcy jurisdiction over real property in which the farmer-debtor, under the law of the state in which such property is located, has no right or equity or interest of any nature at the time he files his petition for relief?

(b) Did Congress have the power under Article I, Section 8, Clause 4, of the Constitution of the United States, to enact Section 75 (n) if it be construed as giving a court of bankruptcy jurisdiction over real property in which the debtor has no right or equity under the applicable state law, but where all rights and equities in and to the property, under such state law, are vested in a third person at the time the debtor files his petition for relief under Section 75?

(c) If Section 75 (n) be thus construed and in pursuance thereof a court of bankruptcy assumes jurisdiction over the property, would the rights of the third person be violated because his property was being taken in contravention to the due process clause of the Fifth Amendment of the Constitution?

(d) And, as thus construed, would Section 75 (n) be an invasion of the powers reserved to the state by the Tenth Amendment and a violation of the property rights of the third person theretofore determined by the law of the state in which the property was located?

D.

Reasons Relied on for Allowance of Writ.

The petitioner submits the following reasons why the judgment of the United States Circuit Court of Appeals for the Seventh Circuit should be reviewed by this Court:

1. In holding that Section 75 (n) of the Bankruptcy Act, gave the bankruptcy court jurisdiction of the real property in question, notwithstanding respondents had no right or equity therein inasmuch as the right of redemption had expired under the law of Indiana prior to the time of the filing of their petition, the Circuit Court of Appeals for the Seventh Circuit rendered a decision involving an important, and substantial question of law in conflict with the decision of the Third Circuit in *Shreiner v. Farmers' Trust Co.*, 91

Fed. (2d) 606, 607, cert. den. 302 U. S. 686; the decision of the Fourth Circuit in *Compton v. Birnie Trust Co.*, 76 Fed. (2d) 639, 27 Am. B. R. (N. S.) 671; the decision of the Fifth Circuit in *Glenn v. Hollums*, 80 Fed. (2d) 55; the decision of the Sixth Circuit in *Heid v. Citizens-Bank of Albany Co.*, 89 Fed. (2d) 105, 107, 108; and the decisions of the Tenth Circuit in *Bastian v. Erickson*, 114 Fed. (2d) 338, and *Buttars v. Utah Mfg. etc. Co.*, 116 Fed. (2d) 622, 624; all of which decisions hold (a) a court of bankruptcy can only acquire jurisdiction over real property under Section 75 of the Bankruptcy Act if the debtor has some right or equity in such property at the time he files his petition for relief, (b) whether debtor has any right or equity in the property must be determined by the law of the state in which the property is located, and (c) if the right or equity of redemption under the state law has expired at the time the petition is filed; then the bankruptcy court cannot acquire jurisdiction of the property under the provisions of Section 75 (n).

2. In holding as above stated, the Circuit Court of Appeals for the Seventh Circuit has construed Section 75 (n) in such manner as to bring its decision in conflict with the following decisions of this Court: *Wright v. Union Central Life Ins. Co.*, 304 U. S. 502, 82 L. ed. 1490, 58 S. Ct. 1025; *Louisville Joint Stock Land-Bank v. Radford*, 295 U. S. 555, 29 L. ed. 1593, 55 S. Ct. 854, 97 A. L. R. 4106; *Union Land Bank v. Byerly*, 310 U. S. 1, 60 S. Ct. 773, 84 L. ed. 1041; and *First Nat'l Bank v. Staake*, 202 U. S. 141, 50 L. ed. 967, 26 S. Ct. 580; all of which decisions hold that a court of bankruptcy cannot acquire jurisdiction over property in which the debtor has no right or equity under the applicable state law.

3. In so holding, the Circuit Court of Appeals for the Seventh Circuit has construed Section 75 (n) in such manner as to render it unconstitutional in each of the following particulars: (a) although Congress can, pursuant to the

power granted by Article 1, Section 8, Clause 4, of the Constitution, protect, preserve and extend existing rights and interests; yet it cannot divest property rights which have vested under the state law or create property rights, and neither can it revive an interest or right which has ceased to exist prior to the time a debtor comes into the bankruptcy court, *Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555, 79 L. ed. 1593, 55 S. Ct. 854, 97 A. L. R. 1106; *Wright v. Union Central Life Ins. Co.*, 304 U. S. 502, 82 L. ed. 1490, 58 S. Ct. 1025; (b) petitioner's property has been taken without due process of law, in contravention of the Fifth Amendment of the Constitution, *Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555, 79 L. ed. 1593, 55 S. Ct. 854, 97 A. L. R. 1106; *Wright v. Union Central Life Ins. Co.*, 304 U. S. 502, 82 L. ed. 1490, 58 S. Ct. 1025; *Union Land Bank v. Byerly*, 310 U. S. 1, 60 S. Ct. 773, 84 L. ed. 1041; *Beard of Trade v. Johnson*, 264 U. S. 1, 68 L. ed. 533, 44 S. Ct. 232; and *First Nat'l Bank v. Staake*, 202 U. S. 141, 50 L. ed. 967, 26 S. Ct. 580; and (c) there is an invasion of the powers reserved to the state by the Tenth Amendment with a resulting violation of the property rights of petitioner theretofore determined by the law of Indiana, *Spindle v. Shreve*, 111 U. S. 542, 547, 28 L. ed. 512, 514, 4 S. Ct. 522; *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. ed. 577, 25 St. Ct. 306; *Zartman v. First Nat'l Bank*, 216 U. S. 134, 54 L. ed. 418, 30 S. Ct. 368; *Bailey v. Baker Ice Mach. Co.*, 239 U. S. 268, 60 L. ed. 275, 36 S. Ct. 50; *Carter v. Carter Coal Co.*, 298 U. S. 238, 80 L. ed. 1160, 56 S. Ct. 855; and *Wright v. Union Central Life Ins. Co.*, 304 U. S. 502, 82 L. ed. 1490, 58 S. Ct. 1025.

WHEREFORE, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify to this Court for its review and determination, on a day certain to be named therein, all proceedings in the case

numbered and entitled on its docket No. 7574, In the Matter of Chancey Ray Brown and Mary G. Brown, Debtors—Chancey Ray Brown and Mary G. Brown, Appellants vs. State Bank of Hardinsburg, Appellee, and that the judgment of said Court may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

STATE BANK OF HARDINBURG,

Petitioner.

By TELFORD B. ORBISON,

Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

A.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals is not reported. It is set forth in the record at pages 86 to 90 and in the Appendix, *infra*, at pages 30 to 34. The dissenting opinion will be found in the record at pages 90 to 93 and in the Appendix at pages 34 to 37.

B.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on November 8, 1941. The jurisdiction of this Court is invoked under Section 75 (n) of the Bankruptcy Act (49 Stat. 942, c. 792; 11 U. S. C. A. Sec. 203); Section 24 (c) of the Bankruptcy Act (52 Stat. 854; 11 U. S. C. A. Sec. 47); and Section 240 of the Judicial Code, as amended (48 Stat. 926; 28 U. S. C. A. Sec. 347).

C.

Statement of the Case.

Concisely stated the facts are these:

On February 19, 1938, respondents executed and delivered to petitioner their promissory note in the amount of \$2,500.00, and to secure payment thereof gave a mortgage on 125 acres of farm land in Orange County, Indiana. (R. 55.)—

On November 20, 1939, petitioner obtained a judgment of foreclosure in the Orange Circuit Court of Orange County,

Indiana, and a decree was entered on that date foreclosing the mortgage and ordering the 125 acres to be sold to pay and satisfy the judgment. No process issued for the execution of said judgment or decree of sale until after the lapse of one year from the filing of the original complaint on March 4, 1939, but, upon execution being issued upon the decree of foreclosure after such expiration, the sheriff of Orange County duly sold the 125 acres on May 25, 1940, to petitioner. (R. 57.)

Respondents did not redeem at any time prior to the sheriff's sale, or at any other time. (R. 57.)

On May 28, 1940, respondents filed their petition under Section 75 of the Bankruptcy Act with the Clerk of the United States District Court for the Southern District of Indiana, New Albany Division, and accompanied the same with schedules, in which they listed, among other property, the 125 acres. (R. 57.)

On June 1, 1940, the sheriff of Orange County executed and delivered a deed to the 125 acres to petitioner. (R. 57.)

On June 30, 1940, petitioner filed its motion to strike the 125 acres from the schedules, on the ground that at the time the petition was filed on May 28, 1940, the respondents had no right or equity in the property, inasmuch as the period of redemption had expired with the sheriff's sale. (R. 57.)

On November 20, 1940, the District Court, after hearing the motion to strike, filed its special findings of fact and conclusions of law and on the same date entered judgment wherein it was ordered that the motion to strike the 125 acres from the schedules be sustained and it was further ordered that said 125 acres be stricken from the schedules and that the bankruptcy proceedings should be dismissed in so far as it pertained to said 125 acres, and the Conciliation Commissioner was ordered and directed to make his report without taking action upon and expressly excepting therefrom said 125 acres. (R. 59 to 61.)

D.

Assignments of Error.

The Circuit Court of Appeals erred:

1. In holding that Section 75 (n) of the Bankruptcy Act gave the District Court, sitting as a court of bankruptcy jurisdiction over the real property in question in which, under the law of Indiana, the respondents had no right or equity or interest of any nature at the time they filed their petition for relief.

2. In holding that Section 75 (n), thus construed, was within the bankruptcy power of Congress, as granted by Article 1, Section 8, Clause 4, of the Constitution.

3. In refusing to hold that Section 75 (n), thus construed, did not violate petitioner's rights as guaranteed by the Fifth Amendment of the Constitution.

4. In refusing to hold that Section 75 (n), thus construed, was not an invasion of the powers reserved to the state by the Tenth Amendment.

E.

Argument.

Summary of argument:

1. Whether respondents had any right or equity in the property in question within the provisions of Section 75 (n) of the Bankruptcy Act must be determined by the law of Indiana.

2. Under the Indiana law the right of redemption was cut off by the sheriff's sale, and inasmuch as respondents did not file their petition for relief under Section 75 until after such sale they had no right or equity in the property and, as a consequence, the bankruptcy court could not obtain jurisdiction over it.

3. The fact that the sheriff's deed was not delivered to petitioner, as purchaser, until after the petition was filed did not operate to give the bankruptcy court jurisdiction of the property under the provisions of Section 75 (n).

4. In amending Section 75 (n) Congress merely intended to clarify the original provisions of the subsection so as to make certain the farmer and his property would come within the jurisdiction of the bankruptcy court "after foreclosure and during the period of redemption". It did not intend to give the farmer any new property right or to subject the real estate to the jurisdiction of the bankruptcy court after the period of redemption had terminated.

5. In holding that the provisions of Section 75 (n) gave the bankruptcy court jurisdiction of the property in question, although the period of redemption had expired at the time the petition was filed, the Seventh Circuit Court of Appeals rendered a decision involving an important and substantial question of law and in conflict with the decisions of the Third, Fourth, Fifth, Sixth and Tenth Circuits, as well as the decisions of the Supreme Court of the United States.

6. The construction placed on Section 75 (n) by the Seventh Circuit renders it unconstitutional, because not within the bankruptcy power of Congress, as provided in Article 1, Section 8, Clause 4, and also because violative of the Fifth and Tenth Amendments.

The decision of the Seventh Circuit Court of Appeals completely disregards the property rights of petitioner as established and protected by the law of the State of Indiana. Contrary to principle and precedent it authorizes a court of bankruptcy to assume jurisdiction over property in which the debtor has no right or equity. It construes

Section 75 (n)⁴ of the Bankruptcy Act in such manner as to give Congress a power far greater than it actually possesses under the bankruptcy power of the Constitution. It arbitrarily takes property from one person and, without just compensation, gives it to another, in contravention to the Fifth Amendment and it results in a direct invasion of the powers reserved to the State by the Tenth Amendment.

The decision is so contrary to fundamental and established principles of property law, so clearly misinterprets the Congressional intent, and in such conflict with the various decisions of the other Circuit Courts of Appeal, as well as the decisions of this Court, it is imperative that certiorari be granted in order that the important and substantial questions involved may be carefully considered and determined.

That the sheriff's sale cut off respondents' right of redemption is beyond question, in view of the provisions of Sections 3-1801, 3-1803, 3-1806 and 3-1808 of Burns Indiana Statutes, 1933. (App. pp. 23-27.) And just as uncontroversible is the proposition that after this right of redemption was cut off the respondents had no right or equity or interest whatever in the property. *Wright v. Union Central Life Ins. Co.*, 304 U. S. 502, 508-511, 514, 82 L. ed. 1490, 1496-1498, 1500, 58 S. Ct. 1025; *Shreiner v. Farmers' Trust Co.*, (3rd C. C. A.) 91 Fed. (2d) 606, cert. den. 302 U. S. 686; *Glenn v. Hollums*, (5th C. C. A.) 80 Fed. (2d) 55; *Hubble v. Berry*, 180 Ind. 513; 519, 103 N. E. 328; *State ex rel. Miller v. Bender*, 102 Ind. App. 185, 1 N. E. (2d) 662.

What right or equity *could* respondents have had in the 125 acres at the time they filed their petition for relief under Section 75? They had lost their right of redemption because the property had been previously sold to

⁴ See pp. 5 and 6 of this brief for complete text.

petitioner at the sheriff's sale. They could not convey or mortgage. They had no rights of possession. In short, they had nothing. All of the rights and incidents of ownership had passed from them to petitioner.

The fact the sheriff's deed was not executed and delivered until after the petition was filed is quite unimportant, notwithstanding the majority opinion of the Seventh Circuit to the contrary. Section 3-1806 of Burns Indiana Statutes, 1933, imposed the duty on the sheriff to execute and deliver a deed to the purchaser "immediately after such sale". Respondents had no power to prevent the delivery of the deed or to prohibit or interfere with its becoming effective and hence had no right or equity in this respect. On the contrary petitioner had the right to mandate the sheriff to perform his duty. *Jessup, et al. v. Carey*, 61 Ind. 584; *Hubble v. Berry*, 180 Ind. 513, 103 N. E. 328; *State ex rel. Miller v. Bender*, 102 Ind. App. 185, 1 N. E. (2d) 662, 663; *Glenn v. Hollums*, (5th C. C. A.) 80 Fed. (2d) 55. Surely it is a novel development in the judicial process for the Seventh Circuit to condition the jurisdiction of the bankruptcy court on whether the sheriff performs his statutory, mandatory duty.

Of course the truth is the delivery of the sheriff's deed was purely an incidental matter. The sheriff's sale terminated all interest of any kind which respondents had in the property and from that time on the petitioner was recognized under the law of Indiana as the absolute owner. *Hubble v. Berry*, 180 Ind. 513, 519, 103 N. E. 328 (quoted with approval in *Wright v. Union Central Life Ins. Co.*, 304 U. S. 502, 509, N. 6, 82 L. ed. 1490, 1497, N. 6); *State ex rel. Miller v. Bender*, 102 Ind. App. 185, 1 N. E. (2d) 662, 663.

The execution and delivery of the deed was merely a ministerial act imposed on the sheriff by the statute and the time and manner of the performance of this act did

not and could not affect the property rights of the parties which had been settled and determined by the sale. *Hubble v. Berry*, 180 Ind. 513, 519, 103 N. E. 328; *State ex rel. Miller v. Bender*, 102 Ind. App. 185, 1 N. E. (2d) 662, 663; *Glenn v. Hollums*, (5th C. C. A.) 80 Fed. (2d) 55; *Shreiner, et al. v. Farmers' Trust Co. of Lancaster*, (3rd C. C. A.) 91 Fed. (2d) 606, 607; *First Nat'l. Bank v. Staake*, 202 U. S. 141, 50 L. ed. 967, 26 S. Ct. 580; 19 R. C. L. Sec. 442; 42 C. J. Sec. 1891.

Nor did Congress intend for Section 75 (n) as amended in 1935 to give a court of bankruptcy jurisdiction over property where the right of redemption had expired at the time the farmer-debtor filed his petition for relief. An examination of the history of the subsection clearly shows that the Congressional intent in passing the 1935 amendment was to set at rest the conflict which had arisen in the various district and circuit courts as to whether the right or equity of redemption was to be included in the term "property" as used in Section 75 (n) as originally adopted. (See Annotation in 99 A. L. R., pp. 1390-1393; H. R. Report No. 1808, p. 2, 74th Congress, First Session; Senate Report No. 985, pp. 1 and 2, 74th Congress, First Session.)

As was stated on the floor of the Senate, the amendment was for the purpose of clarification so as to permit the farmer to take advantage of Section 75 "after foreclosure and during the period of redemption". (Congressional Record, Vol. 79, Part 15, page 15632, Aug. 19, 1935—Set out in full in Appendix at pages 27-30.) (Our emphasis.)

In holding that the District Court, sitting as a court of bankruptcy, acquired jurisdiction under Section 75 (n) of the property in question on the ground the sheriff's deed had not been delivered at the time the petition was filed, despite the fact the right of redemption had expired under the law of Indiana, the Seventh Circuit departed from the

following fundamental and well-established principles of law which have been consistently followed by the various Circuit Courts of Appeal, as well as by this Court:

1. A court of bankruptcy can only acquire jurisdiction over real property under Section 75 of the Bankruptcy Act if the debtor has some right or equity in such property at the time he files his petition for relief.

2. Whether debtor has any right or equity in the property must be determined by the law of the state in which the property is located.

3. If the right or equity of redemption under the applicable state law has expired at the time the petition is filed, then the bankruptcy court cannot acquire jurisdiction of the property under the provisions of Section 75 (n).

As a result, the Seventh Circuit rendered a decision involving important and substantial questions of law in conflict with the cases of *Shreiner v. Farmers' Trust Co.*, (3rd C. C. A.) 91 Fed. (2d) 606, 607, cert. den. 302 U. S. 586, *Compton v. Birnie Trust Co.*, (4th C. C. A.) 76 Fed. (2d) 639, 27 Am. B. R. (N. S.) 671; *Glenn v. Hollums*, (5th C. C. A.) 80 Fed. (2d) 55; *Hoyd v. Citizens Bank of Albany Co.*, (6th C. C. A.) 89 Fed. (2d) 105, 107, 108; *Bastain v. Erickson*, (10th C. C. A.) 114 Fed. (2d) 338; and *Buttars v. Utah Mfg. etc. Co.*, (10th C. C. A.) 116 Fed. (2d) 622, 624; all of which hold that if the equity or right of redemption has expired at the time of the filing of the petition under Section 75, the bankruptcy court has no jurisdiction because the debtor does not have any right or equity in the property. These cases further hold, as against the Seventh Circuit's decision, that whether the debtor has any right or equity in the property at the time of filing the petition must be determined by the law of the state in which the property is located, and that if under the applicable state law the debtor has no such right of equity the jurisdiction of the bankruptcy court does not attach.

The Seventh Circuit's decision also conflicts with the decisions of this Court, which unequivocally hold that a court of bankruptcy cannot acquire jurisdiction over property in which the debtor has no right or equity under the applicable state law. *Wright v. Union Central Life Ins. Co.*, 304 U. S. 502, 82 L. ed. 1490, 58 S. Ct. 1025; *Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555, 79 L. ed. 1593, 55 S. Ct. 854, 97 A. L. R. 1106; *Union Land Bank v. Byerly*, 310 U. S. 1, 60 S. Ct. 773, 84 L. ed. 1041; *Board of Trade v. Johnson*, 264 U. S. 1, 68 L. ed. 533, 44 S. Ct. 232; and *First Nat'l. Bank of Staake*, 202 U. S. 141, 50 L. ed. 967, 26 S. Ct. 580. And the Wright case expressly holds that where, under the state law, the period of redemption has expired at the time the debtor files his petition, the bankruptcy court cannot acquire jurisdiction of the property under Section 75 (n). *Wright v. Union Central Life Ins. Co.*, 304 U. S. 502, 514, 82 L. ed. 1490, 1500, 58 S. Ct. 1025.

Turning now to the constitutional questions presented, the petitioner submits that, unquestionably, as stated by Judge Major in his dissenting opinion, the construction placed upon Section 75 (n) by the majority of the Court of the Seventh Circuit renders it unconstitutional.

Undoubtedly Article 1, Section 8, Clause 4, of the Constitution gives broad power to Congress in the matter of bankruptcy legislation and under such power Congress can protect, preserve and extend existing rights and interests, even to the extent of modifying and affecting property rights established by state law. But it is equally true Congress was not given the power to create property rights or revive or re-create an interest or right has ceased to exist prior to the time a debtor comes into the bankruptcy court. *Wright v. Union Central Life Ins. Co.*, 304 U. S. 502, 82 L. ed. 1490, 58 S. Ct. 1025; *Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555, 79 L. ed. 1593, 55 S. Ct. 854,

97 A. L. R. 1106; and *Union Land Bank v. Byerly*, 310 U. S. 1, 60 S. Ct. 773, 84 L. ed. 1041.

As so pertinently observed by Judge Major, "It (Congress) can administer to the patient as long as a spark of life remains, but when that spark is extinguished, its power no longer exists."

Furthermore, the Seventh Circuit's construction results in Section 75 (n) being violative of the due process clause of the Fifth Amendment. A man's property, title to which has been lawfully acquired by state law in such manner that by state law no other person can legally assert any right, title, claim or interest therein, cannot thereafter be taken from him and given to another without the due process clause being violated. *Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555, 79 L. ed. 1593, 55 S. Ct. 854, 97 A. L. R. 1106; and *Wright v. Union Central Life Ins. Co.*, 304 U. S. 502, 82 L. ed. 1490, 58 S. Ct. 1025.

Finally, as thus construed, Section 75 (n) constitutes an invasion of the powers reserved to the state by the Tenth Amendment with the result there is a violation of the property rights of the petitioner theretofore determined by the law of Indiana. *Spindle v. Shreve*, 111 U. S. 542, 547, 28 L. ed. 512, 514, 4 S. Ct. 522; *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. ed. 577, 25 S. Ct. 306; *Zartmen v. First Nat'l. Bank*, 216 U. S. 134, 54 L. ed. 418, 30 S. Ct. 368; *Bailey v. Baker Ice Mach. Co.*, 239 U. S. 268, 60 L. ed. 275, 36 S. Ct. 50; *Carter v. Carter Coal Co.*, 298 U. S. 238, 80 L. ed. 1160, 56 S. Ct. 855.

This court clearly recognized these constitutional limitations in *Wright v. Union Central Life Ins. Co.*, 304 U. S. 502, 82 L. ed. 1490, 58 S. Ct. 1025, where, before and after pointing out the various ways in which Congress has modified and affected the property rights established by state law, said:

"* * * The debtor has a right of redemption of which the purchaser is advised, and until that right

of redemption expires the rights of the purchaser are subject to the power of the Congress over the relationship of debtor and creditor and its power to legislate for the rehabilitation of the debtor. * * * (Our emphasis.)

"Such action does not indicate a disregard of the property rights created by state law. The state law still establishes the norm to which Congress must substantially adhere; a serious departure from this norm, *i. e.*, from the quality of the property rights created by the state courts, has led to condemnation of the Federal action as constituting a deprivation of property without due process."

Petitioner submits the decision of the Seventh Circuit Court of Appeals constitutes a serious departure from "this norm" and as a result broadens the jurisdiction of Section 75 (n) into the realm of unconstitutionality.

In conclusion, petitioner submits, for the reasons assigned, his petition for writ of certiorari should be granted.

Respectfully submitted,

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New Albany, Indiana,

Counsel for Petitioner.

APPENDIX.

Relative Indiana Mortgage Foreclosure Statutes.

Section 3-1801, Burns Indiana Statutes, 1933:

Mortgages executed after June, 1931—Time of issuing execution—Sale—Notices.—In any proceeding for the foreclosure of any mortgage hereafter executed on real estate, no process shall issue for the execution of any such judgment or decree of sale for a period of one (1) year after the filing of a complaint in any such proceeding: Thereafter, upon the filing of a praecipe therefor by any judgment creditor in said proceeding a copy of the judgment and decree shall be issued and certified by the clerk under the seal of the court, to the sheriff, who shall thereupon proceed to sell the mortgaged premises or so much thereof as may be necessary to satisfy the judgment, interests and costs, at public auction at the door of the court-house of the county in which said real estate is situated by advertising the same by publication once each week for three (3) successive weeks in a daily or weekly newspaper of general circulation printed in the English language and published in the county where the real estate is situated, the first of which publication shall be made, at least thirty (30) days before the date of sale and by posting written or printed notices thereof in at least three (3) public places in the township in which the real estate is situated, and at the door of the court-house of the county: Provided, That if the sheriff be unable to procure the publication of such notice within such county he may dispense with such publication but he shall in his return state his inability to procure such publication and the reason therefor. (Acts 1931, ch. 90, Sec. 1, p. 257.)

Section 3-1802, Burns Indiana Statutes, 1933:

Mortgages executed after June, 1931—Real estate in more than one county—Jurisdiction.—When the mortgaged real estate shall lie in more than one (1) county the court of either county shall have jurisdiction of an action for the foreclosure of the mortgage hereon and all the real estate shall be advertised and sold in the county where the action is brought unless the court in its discretion shall otherwise order and direct. (Acts 1931, ch. 90, Sec. 2, p. 257.)

Section 3-1803, Burns Indiana Statutes, 1933:

Mortgages executed after June, 1931—Redemption before sale—Satisfaction of judgment—Redemption by part owner.—At any time prior to the sale, any owner or part owner of the real estate may redeem the same from the judgment by payment to the clerk, prior to the issuance to the sheriff of the judgment and decree or to the sheriff thereafter, of the amount of the judgment, interest and costs, for the payment or satisfaction of which the sale was ordered, in which event no process for the sale of the real estate under such judgment shall be issued or executed but the officer so receiving payment shall satisfy such judgment and the order of sale shall be vacated: Provided, That if the real estate be so redeemed by a part owner he shall have a lien on the several shares of the other owners for their respective shares of the redemption money with interest at the rate of eight (8) per cent per annum thereon and his costs of redemption, which lien shall be of the same force and effect as the judgment lien so redeemed, and enforceable by appropriate legal proceedings. (Acts 1931, ch. 90, Sec. 3, p. 257.)

Section 3-1804, Burns Indiana Statutes, 1933:

Mortgages executed after June, 1931—Sale of entire body of mortgaged real estate.—In selling such real estate

it shall not be necessary for the sheriff to first offer the rents and profits or separate portions or parcels of the real estate but the whole body of the mortgaged real estate together with rents, issues, income and profits thereof shall be offered and sold, unless the court in its judgment and order of sale shall have otherwise ordered and directed; and if any part of the judgment, interest and costs remains unsatisfied the sheriff shall forthwith proceed to levy the residue on the other property of the defendant. (Acts 1931, ch. 90, Sec. 4, p. 257.)

Section 3-1805, Burns Indiana Statutes, 1933:

Mortgages executed after June, 1931—Sheriff not to purchase—Failure of purchaser to pay—Resale—Disposal of proceeds.—No sheriff or deputy sheriff making any such sale shall directly or indirectly purchase any property so sold. If the purchaser of any property sold on such foreclosure shall fail to immediately pay the purchase-money the sheriff shall resell the property either on the same day without advertisement or on a subsequent day after again advertising the same as above provided, as the judgment creditor may thereupon direct and if the amount bid at the second sale shall not equal the amount bid at the first sale, and the costs of the second sale, the first purchaser shall be liable for the deficiency and damages thereon not exceeding ten (10) per cent and interest and costs to be recovered in the proper court by such sheriff. When property shall be sold for more than will satisfy such judgment, interest and costs, the sheriff shall pay the overplus to the clerk of the court to be disposed of as the court shall direct. Every sale made pursuant to this act shall be without relief from valuation or appraisement laws and without any right of redemption therefrom. (Acts 1931, ch. 90, Sec. 5, p. 257.)

Section 3-1806, Burns Indiana Statutes, 1933:

Mortgages executed after June, 1931—Sheriff's deeds—Rights conveyed.—Immediately after such sale the sheriff

shall execute and deliver to the purchaser a deed of conveyance for the premises which shall be valid and effectual to convey all the right, title and interest held or claimed by all of the parties to said action and all persons claiming under them, and thereupon make due return to the clerk of the court. (Acts 1931, ch. 90, Sec. 6, p. 257.)

Section 3-1807, Burns Indiana Statutes, 1933:

Mortgages executed after June, 1931—Receiver—Rights and duties—Right of resident owner to possession—Rights of crop owner.—In all cases at any time prior to such sale, the court upon the application of the plaintiff may appoint a receiver who shall take possession of the mortgaged premises, collect the rents, issues, income and profits thereof and apply the same to the payment of all taxes, assessments, insurance premiums and repairs required in his judgment to preserve the security of the mortgage debt, and promptly file his final report thereof with the clerk of said court, and subject to the approval of said court account for and pay over to the clerk, subject to the further order of the court, any balance of such income or other avails in his possession then remaining: Provided, That if the mortgaged premises is actually occupied as a dwelling by the record owner of the fee-simple title, he shall be permitted to retain possession thereof, rent free, until such sale, so long as he continues to pay the taxes and special assessments levied against such mortgaged premises and does not suffer waste or other damage to the premises, in the judgment of the court. If the record owner of the fee-simple title does not pay the taxes and special assessments levied against the mortgaged premises, he shall be permitted to retain possession of that part of the mortgaged premises, not exceeding fifteen (15) acres, which is actually occupied as a dwelling by the record owner of the fee-simple title, rent free, until such sale, so long as he does not suffer waste or other damage to the premises in the judgment of the court; and, Provided, further, That the owner of any

crops growing on the mortgaged premises at the time of the commencement of such action, other than the owners of fee-simple title or his or her assigns, shall have the right to enter said premises and care for and harvest said crops at any time within one (1) year from the time of filing such action. (Acts 1931, ch. 90, Sec. 7, p. 257.)

Section 3-1808, Burns Indiana Statutes, 1933:

Mortgages executed after June, 1931—Redemption.—There shall be no redemption from foreclosures of mortgages hereafter executed on real estate except as provided for under this act. (Acts 1931, ch. 90, Sec. 8, p. 257.)

Section 3-1809, Burns Indiana Statutes, 1933:

Mortgages executed prior to June 30, 1931—Laws effective.—The laws of the state of Indiana now in force shall apply to the foreclosure of any mortgage executed prior to the taking effect of this act. (Acts 1931, ch. 90, Sec. 9, p. 257.)

**Congressional Record, Volume 79, Part 15, Page 15632,
August 19, 1935.**

Farm-Mortgage Relief.

The Senate resumed the consideration of the bill (S. 3002) to amend an act entitled "An act to establish a uniform system of bankruptcy throughout the United States", approved July 1, 1898, and amendatory thereof and supplementary thereto.

The Vice President: The clerk will state the first amendment reported by the Committee on the Judiciary.

The first amendment was, in section 4, page 3, line 15, after the word "expired", to insert "or where a deed of trust has been given as security", so as to read:

(n) The filing of a petition or answer with the clerk of

court, or leaving it with the conciliation commissioner for the purpose of forwarding same to the clerk of court, praying for relief under Section 75 of this act, as amended, shall immediately subject the farmer and all his property, wherever located, for all the purposes of this section, to the exclusive jurisdiction of the court, including all real or personal property, or any equity or right in any such property, including among others, contracts for purchase, contracts for deed, or conditional sales contracts, the right or the equity of redemption where the period of redemption has not or had not expired, or where a deed of trust has been given as security, or where the sale has not or had not been confirmed, or where deed had not been delivered, at the time of filing the petition.

Mr. Borah: Mr. President, the measure is here by reason of the decision of the Supreme Court on what is known as the Frazier-Lemke bankruptcy measure which was passed at the last session.

The Supreme Court held a portion of that act, subsection (s), unconstitutional. The purpose of the bill is to avoid the objectionable feature of the former act as they were denounced by the Supreme Court.

In the first place, however, it ought to be said that we undertook to make some amendments in section 75 before we got to subsection (s). These amendments are for the purpose of clarifying section 75. Some of the courts have held that the farmer debtor could not take advantage of the act *after foreclosure sale and during the period of redemption. The bill undertakes to clarify it so as to permit the farmer to take advantage of section 5 after foreclosure and during the period of redemption.*

Some of the courts also refused to permit the farmer who was in that position to file his petition, although under the law of the State he was in possession and full control of the property and could redeem it during the period of moratorium established by the States. One of the amend-

ments to section 5 takes care of that objection which was raised by the court.

Amended subsection (s) construes, interprets, and clarifies both subsections (n) and (o) of section 5. By reading subsections (n) and (o) as now enacted, *it becomes clear that it was the intention of Congress, when it passed section 75, that the debtor and all of his property should come under the jurisdiction of the court of bankruptcy, and that the benefits of the act should extend to the farmer prior to confirmation of sale and during the period of redemption. In other words, the amendments provide that the farmer may avail himself of the act after foreclosure and during the period of redemption, and may also avail himself of the act during the period of the moratorium provided for him within the State.*

It also provides that when the action is taken under section 75 all of the property of the farmer shall be included in the schedules and appraised.

These amendments are for the purpose of clarification of section 75. Now we come to subsection (s). • • • (Italics and emphasis ours.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
For the Seventh Circuit.

No. 7574.

October Term and Session, 1941.

In the Matter of

Chancey Ray Brown and
Mary G. Brown,
Debtors.

Chancey Ray Brown and
Mary G. Brown,
Appellants,

vs.

State Bank of Hardinsburg,
Appellee.

Appeal from the District
Court of the United
States for the Southern
District of Indiana, New
Albany Division.

November 8, 1941.

Before EVANS, MAJOR, and MINTON, *Circuit Judges*.

MINTON, *Circuit Judge*. On March 4, 1939, the appellee filed in the Circuit Court of Orange County, Indiana, a complaint to foreclose a mortgage given by the appellants to the appellee, on a certain tract of land in Orange County, Indiana, consisting of one hundred and twenty-five acres.

On September 25, 1939, appellee filed its amended complaint, making certain judgment creditors of the appellants parties. On November 20, 1939, the court entered a judgment of foreclosure, and authorized the sale of said land. After the expiration of a year from the date of filing the complaint for foreclosure, the sheriff of Orange County sold the real estate to the appellee on May 25, 1940, and on June 1, 1940, delivered a deed therefor to the appellee.

On May 28, 1940, an entry was made in the Clerk's Docket in the District Court for the Southern District of Indiana, which recited that the appellants filed their voluntary petition in bankruptcy under Sec. 75, but the record

shows, and the District Court found, that they actually filed a regular petition and schedules, although they in good faith intended to file a proceeding under Sec. 75. The appellants realized they had made a mistake and had not filed a petition under Sec. 75, and the record shows that on the same date they withdrew the petition that day filed. The record then recites:

"Comes now the debtors * * * and withdraw their petition filed on May 28, 1940 on account of it being wrongfully filed."

On June 4, 1940, the record shows, a proper petition and schedules were filed under Sec. 75.

We think this withdrawal did not amount to a dismissal. Obviously, the papers were withdrawn from the file for the purpose of correction. This view is supported by the fact that the filing on June 4, 1940, carried the same number on the District Court Docket as was assigned to the case when filed May 28, 1940.

We therefore hold that the second filing was an amendment to the first proceeding, and relates back to the original filing, and therefore there was on May 28, 1940, a proceeding pending under Sec. 75. *United States ex rel. Texas Portland Cement Co. v. McCord*, 233 U. S. 157, 34 S. Ct. 550, 58 L. Ed. 893; *Interstate Refineries, Inc. v. Barry*, 7 F. 2d. 548, 556; *General Orders in Bankruptcy*, 37, *Federal Rules Civil Procedure* 15 (C), 28 U. S. C. A. 723(c), *et seq.*

When the appellants filed their amended petition on June 4, 1940, they scheduled as one of their assets the one hundred and twenty-five acres of land which the sheriff had sold to appellee on May 25, 1940. The appellants moved to strike this land from the bankruptcy schedule and the court sustained the motion, and ordered the land stricken from the schedule. From that order, the appellants prosecute this appeal.

It is the contention of the appellants that since the deed was not delivered until after their petition under Sec. 75 was filed, the property came into the jurisdiction of the bankruptcy court and was properly scheduled. The appellee says the equity of redemption was cut off by the sale on May 25, and therefore there was no property or any equity or right in such property left in the appellants, for the bankruptcy court to assume jurisdiction of.

Burns Indiana Statutes (1933) Sec. 3-1801; provides:

"In any proceeding for the foreclosure of any mort-

gage hereafter executed on real estate, no process shall issue for the execution of any such judgment or decree of sale for a period of one (1) year after the filing of a complaint in any such proceeding"

There is no question but what the year had expired before the sale was held, and the regularity of the sale is not questioned. Did the sale cut off the equity of redemption?

Burns Indiana Statutes (1933) Sec. 3-1803, provides:

"At any time prior to the sale, any owner or part owner of the real estate may redeem the same from the judgment by payment to the clerk, prior to the issuance to the sheriff of the judgment and decree or to the sheriff thereafter, of the amount of the judgment, interest and costs, for the payment or satisfaction of which the sale was ordered, in which event no process for the sale of the real estate under such judgment shall be issued or executed but the officer so receiving payment shall satisfy such judgment and the order of sale shall be vacated"

The Indiana courts have not construed this provision of the statute. Counsel on both sides agreed the statute had not been construed by the Indiana courts, and we are unable to find any case construing this section. We decline to anticipate by our decision what the construction of this statute by the Indiana courts may be. Without deciding, we will assume for the sake of the argument that the equity of redemption is cut off by the sale. Under the practice in Indiana, as we understand it, neither the sale needs to be confirmed, nor the deed of the sheriff approved by the court.

The question therefore narrows down to this: admitting that the equity of redemption was cut off by the sale, did that prevent the bankruptcy court from obtaining jurisdiction of the property where the petition under Sec. 75 was pending before the deed was delivered?

Paragraph (N) of Sec. 75, 11 U. S. C. A. Sec. 203(n), reads in part as follows:

"The filing of a petition or answer with the clerk of court, or leaving it with the conciliation commissioner for the purpose of forwarding same to the clerk of court, praying for relief under this section, shall immediately subject the farmer and all his property, wherever located, for all the purposes of this section.

to the exclusive jurisdiction of the court, including all real or personal property, or any equity or right in any such property, including among others, contracts for purchase, contracts for deed, or conditional sales contracts, the right or the equity of redemption where the period of redemption has not or had not expired, or where a deed of trust has been given as security, or where the sale has not or had not been confirmed, or where deed had not been delivered, at the time of filing the petition."

If the statute had stopped with the words "including all real or personal property, or any equity or right in any such property," there would be much force in the argument of appellee that the mortgagor had no equity or right in the property after the equity of redemption was cut off by a regular and legal sale. Then there would be nothing left but the bare legal title. If the sale were invalid, of course, there was no sale and the equity would not be cut off.

The jurisdiction of the bankruptcy court under Sec. 75 does not depend upon the equity of redemption remaining. That is only one of the interests, rights or equities remaining in the mortgagor, which enables him to bring his property into the jurisdiction of the bankruptcy court. This statute has enumerated a number of other things which, if undone, entitles the mortgagor to bring the property in question into the jurisdiction of the bankruptcy court, and one of them is "where a deed has not been delivered." The non-delivery of the deed is in no way related to the equity of redemption, or required as a part of the process to cut off the equity of redemption. It is simply a fact which, if it exists at the time the petition in bankruptcy is filed under Sec. 75, is of itself sufficient to cast upon the bankruptcy court jurisdiction of the property.

This is further borne out by the provisions of Paragraph 75(N), which says:

"In all cases where, at the time of filing the petition, the period of redemption has not or had not expired, or where the right under a deed of trust has not or had not become absolute, or where the sale has not or had not been confirmed, or where deed had not been delivered, the period of redemption shall be extended or the confirmation of sale withheld for the period necessary for the purpose of carrying out the provisions of this section."

This clearly provides if at the time of filing the petition the deed had not been delivered, the period of redemption shall be extended. The lack of delivery of the deed is not coupled with the period of redemption, but is separated by the conjunction "or." The bankruptcy statute, in the case where deed has not been delivered and the petition is filed before deed is delivered, not only casts exclusive jurisdiction upon the bankruptcy court, but authorizes extension of the period of redemption "for the purpose of carrying out the provisions of this section."

Since the mortgage in this case was given after the Bankruptcy Act was passed, we think there can be no question of the right of Congress to pass such legislation under its powers to enact bankruptcy legislation. *Wright v. Vinton Branch*, 300 U. S. 440, 470, 57 S. Ct. 556, 81 L. Ed. 736, 112 A. L. R. 1455; *Kalb v. Feuerstein*, 308 U. S. 433, 60 S. Ct. 343, 84 L. Ed. 370.

We therefore hold that since the deed had not been delivered at the time, to wit, May 28, 1940, the petition under Sec. 75 was filed, that the filing of the petition cast upon the bankruptcy court exclusive jurisdiction, and although the equity of redemption may have been cut off by the sale, the bankruptcy statute authorized the avoidance of that fact and an extension of the period of redemption for the purpose of carrying out the salutary provisions of the Bankruptcy Act.

The judgment is

REVERSED.

MAJOR, *Dissenting*.

I do not agree with the construction placed upon the section of the Bankruptcy Act in controversy. In my opinion the debtors, at the time of filing their petition, either had an interest in the property and therefore entitled to the benefits of the Act, or had no interest and not entitled to such benefits. I think the court should take one horn or the other of the dilemma. Apparently the majority takes both.

The opinion assumes that the debtors' equity of redemption terminated with the Sheriff's sale. Why assume? There is no ambiguity in the Statute. By its plain terms, the equity of redemption was terminated. In addition to the provisions of the Indiana Statute quoted in the opinion, Sec. 3-1808 provides as follows:

"Mortgages executed after June, 1931—Redemp-

tion.—There shall be no redemption from foreclosures of mortgages hereafter executed on real estate except as provided for under this act.”

Upon the expiration of the period of redemption, every right, claim and interest which the debtors had in the property was extinguished. After the sale the debtors would have had no right to redeem even had they possessed the ability to do so. They could have conveyed nothing by deed or otherwise. As was said in *Glenn v. Hollums*, 80 F. (2d) 555, 557:

“* * * Nothing remains to be done to complete the superior title which passed by the sheriff’s sales, except the purely ministerial act of delivering the sheriff’s deed, * * *”

Delivery of the deed was not necessary to vest complete ownership in the purchaser. *Schreiner, et al. v. Farmers’ Trust Co. of Lancaster*, 91 F. (2d) 606, 607; 19 R. C. L. Sec. 442. It was only evidence of the title acquired by such purchaser. At most, the debtors retained nothing other than legal title, in trust for the purchaser. 42 C. J. Sec. 1891. There is no occasion to labor this point further in view of the reasoning of the majority.

It is difficult for me to comprehend the reasoning employed in the construction placed upon Section 75 (π). Perhaps that is the reason I am unable to agree. The phrase “or where deed has not been delivered” is held to “authorize extension of the period of redemption.” This, in my opinion, is a fallacious interpretation, inconsistent with the purport of the paragraph when read in its entirety. It is provided that the filing of a petition “* * * shall immediately subject the farmer and all his property, * * * to the exclusive jurisdiction of the court, * * * or any equity or right in any such property, * * *”. I think it is readily apparent that all the enumerated circumstances which follow are dependent upon the premises that the debtor, upon filing his petition, be possessed of an “equity of right” in the property. If no such right or equity exists, none of the contingencies, including the one here relied upon, can be effective. For instance, among the contingencies enumerated are—“* * * contracts for purchase, contracts for deed, or conditional sales contracts, * * *”. Under the majority construction it would follow that a debtor who, at the time of the filing of his petition, possessed one of these instruments, would bring into the

jurisdiction of the Bankruptcy Court, any land described therein, and this irrespective of the fact that any equity or interest in such land had long before expired. In the same category is the phrase "where deed had not been delivered." There may be situations where the debtor has an "equity or right" until the delivery of a deed. There must be other cases—in fact, this is one—where the extinguishment of his "equity or right" was not dependent upon such delivery.

The construction placed upon the paragraph by the majority would, in my judgment, render it unconstitutional. Neither the Wright nor Kalb case, cited by the majority, sustains such construction. In both those cases, the court was dealing with a property right which the debtor had at the time of the filing of his petition. It seems pertinent to quote what the court in the Kalb case (308 U. S. 433) on page 442, said:

"As stated by the Senate Judiciary Committee in reporting these amendments: " * * * subsection (n) brings all of the bankrupt's property, wherever located, under the absolute jurisdiction of the bankruptcy court, where it ought to be. Any farmer who takes advantage of this act ought to be willing to surrender all his property to the jurisdiction of the court, for the purpose of paying his debts, and for the sake of uniformity. * * * "

In *Wright v. Union Central Ins. Co.*, 304 U. S. 502, the court, in discussing the power of Congress to extend the period of redemption, as fixed by State law, on page 514, said:

" * * * The debtor has a right of redemption of which the purchaser is advised, and until that right of redemption expires the rights of the purchaser are subject to the power of the Congress over the relationship of debtor and creditor and its power to legislate for rehabilitation of the debtor. * * * "

Further, on page 518, the court said:

" * * * But if Congress is acting within its bankruptcy power, it may authorize the bankruptcy court to affect these property rights, provided the limitations of the due process clause are observed."

In *Union Land Bank v. Byerly*, 310 U. S. 1, the court considered whether the debtor had an interest in the land so as to bring it within the jurisdiction of the Bankruptcy

Court, and in deciding adversely to the debtor, on page 10, said:

“* * * Since the foreclosure proceedings had been completed and title had passed thereunder prior to the filing of the debtor's petition for reinstatement, it would have been a vain thing to refer the cause to a conciliation commissioner for administration of property which no longer belonged to the debtor. * * *”

A reading of the cases leaves no doubt of the broad power possessed by Congress in the matter of bankruptcy legislation. The cases are just as convincing, however, that such power is limited to situations where the debtor has some right or interest in the property. Congress can, by legislation, protect, preserve and extend existing rights and interests, but it can not create property rights, nor can it revive an interest or right which has ceased to exist prior to the time a debtor comes into the bankruptcy court. It can administer to the patient as long as a spark of life remains, but when that spark is extinguished, its power no longer exists.

The construction which I place upon the paragraph would give every debtor the benefit of the Act so long as he owned any “equity or right” in the property. I would go no further. I think the action of the District Court was correct and that its order should be affirmed.

Endorsed: Filed Nov. 8, 1941. Kenneth J. Carrick, Clerk.